

Supreme Court of the United States

OCTOBER TERM, 1959 1960

No. 565 18

UNITED STATES, APPELLANT

vs.

JOHN HANCOCK MUTUAL LIFE INSURANCE
CO., ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF
KANSAS

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Original Print

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[fol. 1]

(File Endorsement Omitted)

No. 41,429

IN THE
SUPREME COURT OF THE STATE OF KANSAS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
a Corporation, APPELLEE

vs.

GEORGE HETZEL; GRACE MARIE HETZEL; H. D. TAYLOR;
AMY F. TAYLOR; BERT LEWIS; BUCK LEWIS; W. E.
ROSTINE, WM. R. ROSTINE, BOYD L. ROSTINE; and all
persons who are or were doing business under the
name of THE HUTCHINSON CONCRETE COMPANY; THE
HOME LUMBER AND SUPPLY COMPANY, INC., a Corpora-
tion; HIRAM T. BURR, INC., a Corporation; A. A.
DOERR MERCANTILE COMPANY, a Corporation; SARAH
J. STOUT; CATHERINE M. BOSTWICK; W. L. ROGERS;
MARIAN KOCH; H. F. THOMPSON; GEORGE J. LANGFELD;
MILTON M. MEYER; DONALD MEYER; VIRGIL ERNSTING;
AUGUST KRUEGER; ROY W. REVELL; MARY CATHERINE
BARROW; and the unknown heirs, executors, adminis-
trators, devisees, trustees, creditors and assigns of
such of the defendants as may be deceased; the un-
known spouses of the defendants; the unknown officers,
successors, trustees, creditors and assigns of such
defendants as are existing, dissolved, or dormant
corporations; the unknown executors, administrators,
trustees, creditors, successors and assigns of such
defendants as are or were partners or in partnership;
and the unknown guardians and trustees of such of
the defendants as are minors or are in any wise under
legal disability; THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF EDWARDS, APPELLEES

and

THE UNITED STATES OF AMERICA, APPELLANT

APPEAL FROM THE DISTRICT COURT OF EDWARDS COUNTY, KANSAS
HONORABLE LORIN T. PETERS, JUDGE

ABSTRACT OF APPELLANT, UNITED STATES OF
AMERICA—filed February 6, 1959

[fol. 2]

[fol. 3]

APPELLANT'S ABSTRACT

The following is a full and complete abstract of the record that is necessary for complete understanding of the question presented for review.*

IN THE DISTRICT COURT OF EDWARDS COUNTY,
KANSAS

* PETITION—Filed September 3, 1957

Comes now the above named plaintiff and for its cause of action against the defendants, states and alleges:

That plaintiff is a foreign corporation duly created, organized, and existing under and by virtue of the laws of the State of Massachusetts; that a certificate of authority has been issued by the Secretary of State of Kansas authorizing it to do business in this state;

That plaintiff has its principal place of business and correct post office address at 200 Berkeley Street, Boston, Massachusetts;

FIRST CAUSE OF ACTION

I.

Said plaintiff alleges that on the 29th day of May, 1951, the defendants, George Hetzel and Grace Marie Hetzel, [fol. 4] his wife, for a valuable consideration, made, executed and delivered to the plaintiff their certain installment promissory note in writing whereby they promised to pay to the order of plaintiff \$25,000.00, with interest to be computed from May 1, 1951, at the rate of 4½% per annum, payable on the first day of each and every Janu-

* Captions and signatures appearing on the original pleadings are omitted in this abstract. Exhibits attached to the various pleadings are also omitted as they are copies of notes, mortgages and liens which are not involved in this matter. Pleadings of the party defendants other than those included herein are omitted inasmuch as they are not pertinent to the question involved.

ary beginning January 1, 1952, upon all principal remaining from time to time unpaid; principal to be paid in installments as follows: \$1,000.00 on the first day of January in each and every year thereafter to January 1, 1965, inclusive; and \$11,000.00 on January 1, 1966. It was by said note further expressly agreed that if any default in payment of principal or interest or in the performance or observance of any of the covenants or agreements of any instrument now or hereafter securing this note, the principal remaining unpaid with accrued interest shall at once become due and payable, without notice, and the principal then remaining unpaid with accrued interest shall bear interest at the rate of 10% per annum. A true copy of said note is hereto attached, marked exhibit "A", and made a part hereof;

II.

Plaintiff further alleges that in order to secure the payment of said note and interest, the defendants, George Hetzel and Grace Marie Hetzel, his wife, at the same time duly executed and delivered a mortgage bearing date on that day, whereby they mortgaged, conveyed, and sold to the plaintiff the following described premises with their appurtenances, together with all former, existing and future irrigation and drainage system or systems on or used [fol. 5] in connection with said property, including all water rights, wells, machinery, equipment, rights of way and appurtenances thereunto belonging, used in connection therewith, or in any wise appertaining, whether owned by the mortgagors on the date of the mortgage or hereafter acquired, all of which shall be considered as affixed and appurtenant to the realty and subject to the lien and provisions of the mortgage, of which they were then and are now the owners, to-wit:

The southeast quarter (SE $\frac{1}{4}$) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW $\frac{1}{4}$) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW $\frac{1}{4}$) of section twenty-three (23); thence running east 1025

feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet; thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half ($N\frac{1}{2}$) of section twenty-three (23), lying South and East of the A., T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four (24) together with all accretioned land thereto, all in township twenty-four (24) South of Range nineteen (19) West of the sixth principal meridian, in Edwards County, Kansas;

That the said mortgage was and is a first lien upon said premises, and by its terms said defendants, George Hetzel and Grace Marie Hetzel, his wife, agreed to pay the principal amount secured thereby with interest there-[fol. 6] on according to the terms of the note, marked exhibit "A"; and further agreed to keep the buildings now or hereafter standing on the premises insured against fire and such other casualties as the plaintiff may require; to pay all taxes, assessments and charges of every nature and to whomsoever assessed and before penalty has attached thereto, that may now or hereafter be levied or assessed upon the premises or any part thereof, upon the rents, issues, income or profits thereof, whether any or all of said taxes, assessments, or charges be levied directly or indirectly or as excise taxes or as income taxes; to pay all sums the failure to pay which may result in the acquisition of a lien prior to the lien of this mortgage before such a prior lien may attach. Said mortgage further provided that if payments are made as therein contemplated, the mortgage shall be null and void but upon any default in the performance or observance of any of the covenants and agreements of the instrument hereby evidencing or securing the principal secured, then the whole of the indebtedness secured hereby shall at the election of the plaintiff become immediately due and payable without notice and the plaintiff may immediately cause the mortgage to be foreclosed.

III.

Said mortgage was duly acknowledged, the registration fee thereon paid as shown by the endorsement of the Register of Deeds of Edwards County, Kansas, thereon, and said mortgage was duly recorded in the office of the Register of Deeds of said County, on the 29th day of May, 1951, at 11:00 A.M., in Book 26 of mortgages, at [fol. 7] page 188, a true copy of said mortgage is hereto attached, marked exhibit "B", and made a part hereof;

That no part of said note has been paid, except: payments on account of principal in the amount of \$4,160.00, together with interest through January 1, 1956; except for interest on \$160.00 principal paid July 31, 1956 and due January 1, 1957; and that there is now due on said note and mortgage the sum of \$22,594.28 with interest thereon from May 6, 1957, at the rate of ten per cent per annum computed as follows:

Interest on \$160 principal due 1/1/56 to 7/31/56 @ 10%	9.38
Balance principal payment due 1/1/56	840.00
Interest on \$840 due 1/1/56 to 5/6/57 @ 10%	113.40
Interest on \$20,000 principal 1/1/56 to 1/1/57 @ 4½%	900.00
Interest on \$900 Int. 1/1/57 to 5/6/57 @ 10%	31.50
Principal due 1/1/57 by default	20,000.00
Interest on \$20,000 1/1/57 to 5/6/57 @ 10%	700.00
Total indebtedness to 5/6/57, inclusive	<u><u>22,594.28</u></u>

and by reason of the default in the payment of principal and interest, the plaintiff elected to exercise its option to declare the entire principal sum of said note due and payable as of January 1, 1957, and the mortgage securing the same absolute and subject to foreclosure, and by reason of such default and election there is now due and owing to said plaintiff from said defendants, George Hetzel and Grace Marie Hetzel, his wife, the sum of \$22,594.28 with interest thereon from May 6, 1957, at the

[fol: 8] rate of 10% per annum, and that said mortgage has become absolute and should be foreclosed and the real estate therein described, sold to satisfy the lien thereof.

IV.

Plaintiff further alleges the defendant, United States of America, acting through the Administrator of Farmers Home Administration claims a lien upon said real estate, the exact nature of which is to this plaintiff unknown, subject to the mortgage of the plaintiff, by virtue of a mortgage on said real estate, executed by the defendants George Hetzel and Grace Marie Hetzel, his wife, which mortgage was duly recorded in the Office of the Register of Deeds, in and for said County, on the 22nd day of October, 1953, at 4:40 P.M., in Book 26 of Mortgages on page 377, in the principal amount of \$10,000.00.

V.

Plaintiff further alleges that the defendants, George Hetzel and Grace Marie Hetzel, leased for oil and gas the SW $\frac{1}{4}$ of section 22, township 24 south, range 19 west of the 6th p.m., subject to the right of way of the A. T. & S. F. Railroad and public highway, to H. F. Thompson, by instrument dated August 1, 1952, for a ten year primary term from said date, which instrument was duly recorded in the Office of the Register of Deeds, in and for said County, on March 2, 1953, at 11:00 A.M., in Book 33 misc. records on page 318. That plaintiff waived the priority of mortgage and excepted and released the working interest held under and by virtue of said oil and gas lease from the lien of plaintiff's mortgage and agreed that [fol: 9] said lease should have the same validity and effect as if executed, delivered and recorded prior to the date of execution of said mortgage; that the defendants, H. F. Thompson, George J. Langfield, Milton M. Meyer, Donald Meyer, Virgil Ersting, August Krueger, Marian Koch, Roy W. Revell, Mary Kathryn Barrow, W. L. Rogers, and Edward A. Bortz, are assignees of the lease.

VI.

Plaintiff does not know the place of residence or addresses of any of the defendants above named and designated except as hereinafter stated.

VII.

Plaintiff does not know whether the individual defendants above named and designated, or any of them, are living or deceased, and does not know the names or addresses of the heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased. Plaintiff is informed the defendants H. D. Taylor, Amy F. Taylor, and H. F. Thompson, Bert Lewis and Buck Lewis, are residents of Kinsley, Kansas, that their post office address is that City; that the defendants George Hetzel and Grace Marie Hetzel are residents of Edwards County, Kansas, that their post office address is Rural Route, Kinsley, Kansas; Plaintiff does not know whether The Hutchinson Concrete Company was a firm, partnership or corporation, but is informed that W. E. Rostine, Wm. R. Rostine, and Boyd L. Rostine, if the firm was not incorporated, are or were doing business under the name of The Hutchinson Concrete Company, [fol. 10] having post office address at P. O. Box 646, Hutchinson, Kansas; and plaintiff does not know the names of the executors, administrators, trustees, creditors and assigns of such defendants as are or were partners or in partnership.

VIII.

Plaintiff does not know whether the defendants, The Home Lumber and Supply Company, Inc., A Corporation; Hiram T. Burr, Inc., A Corporation; A. A. Doerr Mercantile Company, A Corporation, are existing, dissolved or dormant corporations, and does not know the names or addresses of their officers, successors, trustees, creditors and assigns.

IX.

Plaintiff does not know whether any of the defendants are married, and does not know the names or addresses of

the spouses of such of the defendants as may be married, or any of them, except the defendants George Hetzel and Grace Marie Hetzel, his wife.

X.

Plaintiff does not know whether any of the defendants are minors or are under legal disability, and does not know the names, residences or addresses of the guardians or trustees of such defendants or any of them.

XI.

None of the defendants herein has designated any process agent upon whom service of summons can be made within the State of Kansas, under the provisions of the Statutes of Kansas relating thereto.

[fol. 11]

XII.

The defendants, above named and designated, in the caption hereof, and each of them, claim some title, estate or interest in or lien upon the mortgaged premises above described, adverse to the plaintiff, the exact nature of which is unknown to the plaintiff, but plaintiff alleges that whatever claim or right or interest the defendants have or may have had are void and inferior and junior to the lien of the plaintiffs' mortgage, and that the judgment to be rendered herein should so provide.

SECOND CAUSE OF ACTION

I.

Said plaintiff adopts the allegations and averments heretofore made in this petition and incorporates the same herein by reference as a part hereof, and further alleges that taxes for the years 1953, 1954, 1955, and 1956 were duly levied and assessed against the above described real estate, and were not paid by said mortgagors when due; that to protect the lien of its mortgage and by virtue of the provisions therein contained, said plaintiff was forced to and did, on June 12, 1957, pay and advance to the County Treasurer of Edwards County, Kansas, the sum

of \$2,803.07, being the amount of unpaid taxes with interest, penalties and costs, and is now the owner and holder of tax receipts therefor; that by reason of such default and payment, there is now due and owing to the plaintiff from the defendants, George Hetzel and Grace Marie Hetzel, his wife, the sum of \$2,803.07, with interest at ten per cent per annum from June 12, 1957, for which [fol. 12] plaintiff is entitled to judgment, and that said sum is a lien upon the real estate above described and is secured by the mortgage foreclosed herein.

THIRD CAUSE OF ACTION

I.

Said plaintiff adopts the allegations and averments heretofore made in this petition and incorporates the same herein made by reference as a part hereof, and further alleges that the defendants George Hetzel and Grace Marie Hetzel, his wife, mortgagors, failed to keep said premises insured and in consequence thereof plaintiff caused them to be insured in the Springfield Fire & Marine Insurance Company for a term of one years from the 23rd day of April, 1957, and paid the premium of \$157.15 dollars to protect the lien of its mortgage and by virtue of the provisions therein contained; that by reason of the failure of defendants, George Hetzel and Grace Marie Hetzel, his wife, to pay said insurance premium, there is now due and owing to the plaintiff from the said defendants the sum of \$157.15 with interest at the rate of ten percent per annum from April 23, 1957, for which plaintiff is entitled to a judgment, and that said sum is a lien upon the real estate above described and is secured by the mortgage foreclosed herein.

Wherefore, Plaintiff demands judgment adjudging the amount due on said note and mortgage, against the defendants George Hetzel and Grace Marie Hetzel, his wife, in the sum of \$22,594.28, with interest at ten per cent per annum from May 6, 1957, and the further sum of \$2,803.07 with interest at ten per cent per annum from June 12, [fol. 13], 1957, for taxes paid by plaintiff upon said premises, and the further sum of \$157.15 with interest at ten

per cent per annum from April 23, 1957, for insurance premiums on the buildings on said premises paid by plaintiff, together with costs and disbursements, and for judgment decreeing the mortgage above described to be a first lien upon the real estate described therein and that said first mortgage be foreclosed and adjudging and directing a sale of the premises aforesaid according to law by the Sheriff of Edwards County, Kansas, and that the proceeds arising from such sale be applied as follows:

1. In payment of the costs of this suit and of such sale;
2. In payment of any taxes then due and unpaid on said real estate;
3. In payment of the amount adjudged due the plaintiff herein;
4. And that the balance, if any, be brought into court to abide the further order of the court.

And for further judgment, that the defendants, and all persons claiming by, through or under them, be forever barred and foreclosed and excluded of all rights, claims, liens, interest, estate or equity in and equity of redemption in said mortgaged premises, and every part thereof, adverse to the title and possession of the purchaser at such sale, except only the statutory right to redeem said premises as provided by the Laws of Kansas, and that plaintiff have such other and further relief, as to the court shall seem just and proper.

[fol. 14]

IN DISTRICT COURT OF EDWARDS COUNTY

SEPARATE ANSWER AND CROSS-PETITION OF UNITED STATES

For its separate answer to this cause of action the defendant, United States of America, alleges and states:

1. Being without knowledge and information to form a belief as to the truth of the allegations contained in plaintiff's Petition filed herein, this answering defendant denies all the allegations stated in said Petition.

CROSS-PETITION

For its Cross-Petition herein, the defendant, United States of America, states:

1. That the defendants George Hetzel and Grace Hetzel are indebted to the Farmers Home Administration, an agency of this answering defendant, in the following amounts:

(a) \$584.91 representing unpaid principal and interest due on a promissory note executed by defendant George Hetzel and delivered to the Governor of the Farm Credit Association, the predecessor of the Farmers Home Administration, an agency of this defendant, dated April 25, 1934, in the face amount of \$250.00.

(b) \$874.77 representing unpaid principal and interest due on a promissory note executed by defendants George Hetzel and Grace Hetzel and delivered to the Governor of the Farm Credit Association, the predecessor of the Farmers Home Administration, an agent of this defendant, dated September 14, 1936, in the face amount of \$400.00.

(c) \$10,317.39 representing the unpaid principal and interest due on a promissory note executed by defendants [fol. 15] George Hetzel and Grace Hetzel and delivered to the Farmers Home Administration, an agency of the defendant, dated September 4, 1953, in the face amount of \$10,565.00. A real estate mortgage was executed by the defendants George Hetzel and Grace Hetzel and delivered to the Farmers Home Administration, an agency of the defendant, to secure payment of said note of \$10,565.00. Said mortgage was filed in the office of the Register of Deeds of Edwards County, Kansas, on October 22, 1953, at 4:40 P.M., and recorded at Book 26, Page 377 of the records of said office.

(d) \$1,167.81 representing the unpaid principal and interest due on a promissory note executed by defendants George Hetzel and Grace Hetzel and delivered to the Farmers Home Administration, an agency of this defendant, dated May 3, 1954, in the face amount of \$1,000.00. A crop and chattel mortgage was executed by the defendants George Hetzel and Grace Hetzel and delivered

to the Farmers Home Administration, an agency of this defendant, to secure payment of said note of \$1,000.00 and the note referred to in paragraph 1(c) hereinabove. Said mortgage was filed in the office of the Register of Deeds of Edwards County, Kansas, on July 16, 1957, at 1:00 P.M. and duly recorded in the records of said office.

2. That the lien described in paragraph 1(c) hereinabove, together with the other debts described in paragraph 1 above, constitute liens inferior only to that of plaintiff herein, on the real property of defendants George Hetzel and Grace Hetzel situated in Edwards County, Kansas, to-wit:

[fol. 16] The southeast quarter (SE $\frac{1}{4}$) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW $\frac{1}{4}$) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW $\frac{1}{4}$) of section twenty-three (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet; thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half (N $\frac{1}{2}$) of section twenty-three (23), lying South and East of the A., T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four (24) together with all accreted land thereto, all in township twenty-four (24), South of Range nineteen (19) West of the sixth principal meridian, in Edwards County, Kansas.

3. That a Certified Statement of Account reflecting all payments made by and credits due to the above-named defendants on the above-described indebtedness, together with copies of the notes and mortgages referred to in paragraph 1 hereinabove are attached hereto, marked Exhibits "A", "B", "C", "D", "E", "F" and "G" are made a part hereof.

4. That there is due and owing from the defendants George Hetzel and Grace Hetzel to this answering defend-

ant on the notes described in paragraph 1 hereinabove, the total amount of \$12,944.83 as of September 26, 1957, together with daily interest thereafter on said amount of \$1.4534; that upon demand, defendants George Hetzel and [fol. 17] Grace Hetzel have failed and otherwise refused to pay said sum to this defendant.

Wherefore, this answering defendant prays that the Court find that the United States of America has a lien on the real estate of defendants George Hetzel and Grace Hetzel in the amount of \$12,944.83 with interest thereon at the rate of \$1.4534 daily after September 26, 1957, until paid; that said lien is inferior only to that of plaintiff herein on said property, and in the event the Court shall enter an order providing for the judicial sale of the above-described real estate, that after the payment of costs and expenses and plaintiff's lien, the proceeds of such sale be next applied to this answering defendant's lien, and for all other relief in the premises.

IN DISTRICT COURT OF EDWARDS COUNTY

SEPARATE ANSWER OF BERT LEWIS AND BUCK LEWIS

For their separate answer to this cause of action, the defendants, Bert Lewis and Buck Lewis, allege and state:

1. Being without knowledge and information to form a belief as to the truth of the allegations contained in plaintiff's petition filed herein, these answering defendants deny all the allegations stated in said petition.
2. And for their further answer, herein, the defendants state as follows: That the defendant, George Hetzel, is indebted to the defendants, Bert Lewis and Buck Lewis, in the amount of \$1,714.61, which sum or sums are secured by a certain personal property mortgage, executed June 7, 1957, upon the following described personal property, to-wit:
 - [fol. 18] 1 Model 317 V8 Ford Industrial Motor,
 - 1 Gardner Denver 3x4 Pump,
 - 1600 feet of 6-inch aluminum pipe and fittings,
 - 1000 feet of 4-inch aluminum pipe and fittings,
 - with 24 rainbird sprinklers;

which mortgage was filed in the office of the Register of Deeds of Edwards County, Kansas, on July 10th, 1957, at two o'clock P.M., as Chattel Mortgage, No. 2381, and said chattel mortgage is hereto attached, marked "Exhibit A," and made a part hereof.

3. That the mortgage of the plaintiff herein is junior, inferior, and invalid as against the chattel mortgage of these defendants, Bert Lewis and Buck Lewis, upon the above described personal property, for the following reasons:

- a. The above described personal property was not owned by the defendants, George Hetzel and Grace Marie Hetzel, mortgagors, at the time of the execution of plaintiffs' mortgage herein, nor had said mortgagors contemplated the immediate acquiring of said property.
- b. That the defendants, George Hetzel and Grace Marie Hetzel, acquired title to the personal property hereinbefore described after the execution of the mortgage as alleged in plaintiff's petition.
- c. That the defendants, George Hetzel and Grace Marie Hetzel, executed a purchase money mortgage upon the above described personal property, to Hiram T. Burr, Inc., et al., and that the defendant, George Hetzel, subsequently executed the chattel mortgage a copy of which is attached [fol. 19] hereto and marked "Exhibit A", to defendants, Bert Lewis and Buck Lewis, for the sum of \$1,714.61, and that said sum or sums were paid directly to Hiram T. Burr, Inc., et al., and that as a result thereof, said chattel mortgage executed to these defendants became, and is, a purchase money mortgage upon the above described personal property.
- d. That the plaintiff herein failed to properly file its mortgage as alleged in plaintiff's petition for record as a chattel mortgage in the office of the Register of Deeds of Edwards County, Kansas, and that the defendants, Bert Lewis and Buck Lewis, had no constructive notice of plaintiff's claim upon the above described personal property.

- e. That the defendants, Bert Lewis and Buck Lewis, had no actual notice of plaintiff's claim or alleged chattel mortgage upon the above described personal property.
4. And for further answer the defendants, Bert Lewis and Buck Lewis, disclaim all right, title, and claim to the real estate mortgaged to the plaintiff herein, as alleged in plaintiff's petition.
5. And for further answer, these defendants state and allege, that none of the personal property, as above described, and as set out in attached "Exhibit A", is in any way affixed or appurtenant to the realty described in plaintiff's petition.

And that for the above and foregoing reasons the plaintiff's claim or alleged chattel mortgage upon the personal property above described is invalid, but should [fol. 20] the court find that plaintiff has any interest or lien upon said personal property, that the same is junior and inferior to the chattel mortgage of defendants, Bert Lewis and Buck Lewis, upon all of the above described personal property.

Wherefore, these answering defendants pray that the court find that the alleged lien or chattel mortgage of the plaintiff is invalid; but that should the court find that the plaintiff has any claim against said personal property, that the court further find that these defendants, Bert Lewis and Buck Lewis, have a first and prior lien upon the personal property, above described, in the amount of \$1,714.61, with interest thereon at the rate of 6% per annum from June 7th, 1957, until paid; that said lien is senior to that of plaintiff herein and any other party hereto on said personal property; and in the event the court shall enter an order providing for the judicial sale of the above described personal property, that after the payment of costs, the proceeds of such sale be first applied to these answering defendants' lien, and for all other relief in the premises.

IN DISTRICT COURT OF EDWARDS COUNTY

DISCLAIMER OF JOHN HANCOCK MUTUAL LIFE INSURANCE
COMPANY

Comes now the plaintiff, John Hancock Mutual Life Insurance Company, a corporation, and says that it denies that it claims any lien upon or interest in the following described personal property, to-wit:

- 1 model 317V8 Ford Industrial Motor;
- 1 Gardner Denver 3x4 pump;
- 1600 feet of 6 inch aluminum pipe and fittings;
- 1000 feet of 4 inch aluminum pipe and fittings with 24 rainbird sprinklers;

[fol. 21] covered by a chattel mortgage from George Hetzel to Bert Lewis and Buck Lewis, recorded in office of the Register of Deeds of Edwards County, Kansas, on July 10, 1957, at 2:00 P.M., as chattel mortgage, No. 2381.

IN DISTRICT COURT OF EDWARDS COUNTY

ANSWER TO CROSS PETITION BY JOHN HANCOCK MUTUAL
LIFE INSURANCE COMPANY

For its separate answer to the cause of action of the defendant, United States of America, the plaintiff alleges and states:

1. Being without knowledge and information to form a belief as to the truth of the allegations contained in defendant's, United States of America, cross petition filed herein, this answering plaintiff denies each and every allegation of fact in the petition contained.

IN DISTRICT COURT OF EDWARDS COUNTY

JOURNAL ENTRY OF JUDGMENT—December 4, 1957

Now on this 4th day of December, 1957, being an adjourned day of the regular October, 1957, term of said court, the above entitled case comes regularly on for hearing, the plaintiff John Hancock Mutual Life Insurance

Company, appearing by James R. Boyd, its attorney; and the defendant and cross-petitioner, United States of America, appearing by E. Edward Johnson, Assistant United States Attorney, District of Kansas; and the defendants Bert Lewis and Buck Lewis, appearing by Rae E. Batt, their attorney; and the defendants H. F. Thompson *pro se* and George J. Langfeld; Milton M. Meyer, Donald Meyer, Virgil Ernøting, August Krueger, Marian Koch, Ray W. Revell, Mary Kathryn Barrow, W. L. Rogers, Edward A. Bortz, appearing by H. F. Thompson, their attorney; [fol. 22] the defendants in the military service appear by Rae E. Batt, their attorney appointed by the court, and the defendants who are minors or are in anywise under legal disability appear by Rae E. Batt, their guardian *ad litem*; and the defendant, Hiram T. Burr, Inc., appearing by its attorneys, Minner and Waite; and the remaining defendants appearing not, either in person or by attorney, but wholly making default herein, and thereupon, the case being called for trial, a jury is waived and the case is tried to the court, and the court having heard the evidence and arguments of counsel, and being fully advised in the premises finds:

That the defendants George Hetzel; Grace Marie Hetzel; H. D. Taylor; Amy F. Taylor; H. F. Thompson; The Board of County Commissioners of the County of Edwards; Bert Lewis; Buck Lewis; Hiram T. Burr, Inc., a Corporation; A. A. Doerr Mercantile Company, a Corporation; The Home Lumber and Supply Company, Inc., a Corporation; W. E. Rostine, Wm. R. Rostine, Boyd L. Rostine, doing business under the firm name of Hutchinson Concrete Company; have each and all been duly and regularly served with summons as required by law, and as shown by Sheriff's returns filed herein, which service of summons were regular and in accordance with law, and the same are hereby approved; that the defendant, United States of America acting through the Administrator of Farmers Home Administration, has been duly and regularly served with process as required by United States Code, Title 2832410, as shown by Sheriff's return and registered return mail receipt filed herein, which service of summons and process and mailing of process and com-

plaint was regular and in accordance with law, and the same is hereby approved.

[fol. 23] Thereupon, plaintiff shows to the court, and the court further finds that the defendants, Sara J. Stout, Catherine M. Bostwick, W. L. Rogers, Marian Koch, George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Roy W. Revell, Mary Katheryn Barrow, have been duly and regularly served with summons by publication according to law, and the affidavit for such service, the published notice of suit and the proof of publication thereof are presented to, examined and approved by the court; and the court further finds that said defendants Sara J. Stout, and Catherine M. Bostwick have failed to answer or otherwise plead to plaintiff's petition and are wholly in default, except the defendants in military service, who appear by their attorney appointed by the court, and the defendants under disability, who appear by their guardian *ad litem*, as herein set out.

The court further finds that the plaintiffs have filed an affidavit showing that they do not know and are unable to determine whether the defendants or any of them are in the military service of the United States as defined by the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, and the court has heretofore appointed an attorney to represent and protect the interests of any of the defendants who are in the military service as defined by said act, and said attorney has filed answer consisting of general denial and appears for said defendants as above set out, and the court finds that the ability of the said defendants to conduct their defense is not materially affected by reason of their military service.

[fol. 24] The court further finds that a guardian *ad litem* has heretofore been appointed for such of the defendants named and designated in plaintiffs' petition as are minors or are in any wise under legal disability, and that said guardian *ad litem* has filed answer consisting of general denial and appears for the said defendants as above set out.

The court further finds that the United States of America has filed its answer and cross petition herein;

that the defendants Bert Lewis and Buck Lewis have filed their answer; that the defendants Hiram T. Burr, Inc., H. F. Thompson, George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Marion Koch, Ray W. Revell, Mary Kathryn Barrow, W. L. Rogers, and Edward A. Bortz have filed their disclaimers denying the existence of any claim, lien, or interest in the property which is the subject of this action.

The court further finds that the plaintiff is a corporation created, organized and existing under the laws of the State of Massachusetts, licensed to do business in the State of Kansas;

The court further finds that the plaintiff has filed its disclaimer denying the existence of any claim, lien or interest in personal property secured by a chattel mortgage recorded in the office of the Register of Deeds of Edwards County, Kansas, July 10, 1957, as chattel mortgage No. 2381, described as: 1 model 317V8 Ford Industrial Motor; 1 Gardner Denver 3x4 pump; 1600 feet of 6 inch aluminum pipe and fittings; 1000 feet of 4 inch aluminum pipe and fittings with 24 rainbird sprinklers.

[fol. 25] The court further finds that the allegations contained in the plaintiff's petition are true; that on the 29th day of May, 1951, defendants George Hetzel and Grace Marie Hetzel executed and delivered to plaintiff their certain promissory note for Twenty-five thousand dollars (\$25,000.00) with interest thereon to be computed from May 1, 1951, at the rate of $4\frac{1}{2}\%$ per annum, payable on the first day of each and every January, beginning January 1, 1952, upon all principal remaining from time to time unpaid, the principal of said note to be paid in installments, as set forth in plaintiff's petition; it being specifically provided that if any default in payment of principal or interest or in the performance or observance of any of the covenants or agreements of any instrument now or hereafter securing the note, the principal remaining unpaid with accrued interest shall at once become due and payable, without notice, and the principal then remaining unpaid with accrued interest shall bear interest at the rate of 10% per annum until paid; that the makers of said note made default in the payment of principal installment and interest due and payable; and they are

also in default in the payment of subsequent maturing installments of principal and interest thereon as alleged in plaintiff's petition and that such default continued prior to the institution of this action, and that the plaintiff elected to declare said indebtedness, principal and interest, due and payable by reason of such default, and that there is now due from the defendants, George Hetzel and Grace Marie Hetzel, to the plaintiff the sum of Twenty-two thousand five hundred and ninety four dollars and twenty-eight cents (\$22,594.28), the amount of principal [fol. 26] and interest due May 6, 1957, with interest thereon at the rate of 10% per annum from May 6, 1957, and the costs of this action taxed at \$.....

The court further finds that, to secure the payment of said note and interest thereon, the defendants George Hetzel and Grace Marie Hetzel, executed and delivered to plaintiff their certain mortgage, dated May 29, 1951, acknowledged by the mortgagors May 29, 1951, before H. D. Taylor, notary public in and for Edwards County, Kansas, which was filed for record May 29, 1951, and recorded in Book 26 of mortgages at page 188, of the records in the office of the Register of Deeds of Edwards County, Kansas, which mortgage is on all of:

The southeast quarter (SE $\frac{1}{4}$) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter (NW $\frac{1}{4}$) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter (NW $\frac{1}{4}$) of section twenty-three (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet; thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half (N $\frac{1}{2}$) of section twenty-three (23); lying South and East of the S. T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four (24) together with all accretioned land thereto, all in township twenty-four (24) South of Range nineteen (19) West of the sixth principal meridian, in Edwards County, Kansas;

[fol. 27] that under the terms of said mortgage it is provided that, in case the mortgagors fail to pay the taxes levied and assessed against the premises, the owner and holder of said mortgage indebtedness has the right to pay the same, and that the amount so paid should become a lien against said property and bear interest at the rate of 10% after the date of payment and that on June 12, 1957, the plaintiff paid \$2,803.07 taxes, which were a lien on said premises under the terms of said mortgage, and is entitled to interest thereon from said date at the rate of 10% per annum, amounting to \$2,803.07 with interest at 10% per annum from June 12, 1957. Further, that under the terms of said mortgage it is provided that, in case the mortgagors fail to keep the buildings now or thereafter standing on the premises insured against fire and such other casualties as the plaintiff may require, the owner and holder of said mortgage indebtedness has the right to insure the premises, and that the amount so paid shall become a lien against said property, and bear interest at the rate of 10% after the date of payment, and that on April 23, 1957, the plaintiff paid \$157.15 insurance premium to the Springfield Fire and Marine Insurance Company for a term of one year from April 23, 1957, which was a lien on said premises under the terms of said mortgage and is entitled to interest thereon from said date at the rate of 10% per annum, amounting to \$157.15 from April 23, 1957, with interest at 10% per annum from April 23, 1957.

The court further finds that, by reason of default in payment of said indebtedness secured by said mortgage aforesaid, the conditions of said mortgage have been [fol. 28] broken, and the plaintiff at the institution of this action was and is now entitled to foreclose the same under the terms thereof, that said mortgage is a first and prior lien for all of the indebtedness hereinbefore described, and that from and after the sale of the premises all of the defendants to this action shall be forever barred and estopped from claiming any right, title, lien, estate or interest in, to, and upon said premises and every part thereof, as against the purchaser at such sale.

The court further finds that on the 4th day of September, 1953, defendants, George Hetzel and Grace Marie Hetzel, his wife, executed and delivered to The Farmers Home Administration, an agency of the defendant, United States of America, their certain promissory note for \$10,500.00 with interest thereon from date at the rate of 5% per annum on unpaid balances, the principal of said note being paid in installments, as set forth in defendants' United States of America, cross petition; It being specifically provided that, if any of said installments of interest or principal should not be paid when due, then said note, at the option of the holder, shall become due and payable; that the makers of said note made default in payment of the installment and interest due and payable, and that such default, continued for more than ten days prior to the institution of this action, and that defendant, United States of America, elected to declare said indebtedness, principal and interest, due and payable by reason of such default and that there is now due from the defendants, George Hetzel and Grace Marie Hetzel, his wife, the sum of \$10,317.39, the amount of principal and interest due as [fol. 29] of September 26, 1957, together with interest on \$9,025.62 from said date at the rate of five percent per annum, as provided in said note, amounting to \$85.22, making a total of \$10,402.61, plus additional interest on \$9,025.62 at the rate of \$1.2365 daily from this date.

The court further finds that, to secure the payment of said note and interest thereon, the defendants, George Hetzel and Grace Marie Hetzel executed and delivered to defendant, United States of America their certain mortgage, subject to the mortgage of the plaintiff, dated October 22, 1953, acknowledged by the mortgagors October 22, 1953, before Myrtle Richardson, a notary public in and for Edwards County, Kansas, which was filed for record October 22, 1953, and recorded in Book 26 at page 377, of the records in the office of the Register of Deeds of Edwards County, Kansas; which mortgage is on the property hereinabove described; that said cross petitioner, United States of America, is entitled to judgment on the cause of action herein set out against the defendants, George Hetzel and Grace Marie Hetzel, in the sum of \$10,402.61 with interest

on \$9,025.62 at the rate of \$1.2365 per day from December 4, 1957, and that by virtue of said mortgage, said judgment is a second lien upon the real estate above described, subject only to the lien of the judgment herein rendered in favor of the plaintiff.

The court further finds that the allegations contained in defendant's United States of America cross petition, numbered 1(a), 1(b), and 1(d), as represented by exhibits "A", "D", and "H", are true and correct and that the defendant, United States of America, is entitled to [fol. 30] judgment on the cause of action herein set out at 1(a) against the defendant George Hetzel in the further sum of \$586.98 with interest on \$249.65 at the daily rate of \$.0307 from this date; and do have and recover from the defendants George Hetzel and Grace Marie Hetzel, the further sum of \$2,055.41, with interest on \$1,400.00 at the daily rate of \$.1862 from this date.

It Is Therefore Ordered, Adjudged, and Decreed by the Court that the plaintiff have and recover of the defendants, George Hetzel and Grace Marie Hetzel, the sum of \$26,944.78, with interest thereon at the rate of ten percent per annum from this date, and costs of this action, which judgment is hereby decreed to be a valid first lien upon the real estate above described.

It Is Further Ordered, Adjudged, and Decreed by the Court that the defendant, United States of America, do have and recover of the defendants, George Hetzel and Grace Marie Hetzel, the sum of \$10,402.61 with interest on \$9,025.62 at the rate of \$1.2365 per day from this date, and for costs, which judgment is hereby decreed to be a second lien upon the real estate above described, subject only to the lien of plaintiff herein as above set forth.

It Is Further Ordered, Adjudged, and Decreed by the Court that the defendant, United States of America, do have and recover of the defendant, George Hetzel, the further sum of \$586.98 with interest on \$249.65 at the daily rate of \$.0307 from this date; and do have and recover from the defendants George Hetzel and Grace Marie Hetzel, the further sum of \$2,055.41, with interest on \$1,400.00 at the daily rate of \$.1862 from this date,

[fol. 31] It Is Further Ordered, Adjudged, and Decreed by the Court that the defendants, Bert Lewis and Buck

Lewis, have a first and prior lien on the items of personal property described in a chattel mortgage recorded in the office of the Register of Deeds of Edwards County, Kansas, July 10, 1957, No. 2381.

It Is Further Ordered, Adjudged, and Decreed by the Court that said first and second mortgage be foreclosed. That if said defendants, George Hetzel and Grace Marie Hetzel, fail to pay said judgments within ten days from this date, on order of sale issue herein, as by law made and provided, directed to the Sheriff of Edwards County, Kansas; commanding said Sheriff to advertise and sell said described premises, according to law; and subject to redemption for the period of eighteen months after the date of said sale; and that the proceeds arising from said sale be applied as follows:

First: to the payment of the costs of this action, and of said sale;

Second: to the payment of all taxes which are a lien and payable on said premises at the time of said sale;

Third: to the payment of the first lien in favor of the plaintiff, John Hancock Mutual Life Insurance Company, a corporation;

Fourth: to the payment of the second lien in favor of the defendant, the United States of America, and costs;

Fifth: the balance, if any, to be paid to the person or persons entitled thereto under the direction of the court; [fol. 32] together with accumulated interest on the liens to date of sale; that upon confirmation of the sale of said real estate, as aforesaid, the sheriff of said county shall issue to the purchasers of said real estate at said sale a good and sufficient certificate of purchase as provided by law, and in case said real estate is not redeemed from said sale for a period of eighteen months from the date of sale, as is by law in such cases made and provided, that the sheriff of said county shall thereupon issue and deliver to such purchaser his heirs and assigns, or its successors and assigns, as the case may be, a good and sufficient warranty deed to the said described real estate, as provided by law, and to put such purchaser into full possession of said described real estate, as against said defendants.

It Is Further Ordered, Adjudged and Decreed, that from and after the date of the sheriff's sale, the title and possession of the purchaser at such sale in and to the said real estate is forever quieted against any pretended right, title, interest, estate, lien or claim of the defendants, and the unknown heirs, executors, administrators, devisees, trustees, creditors and assigns of such of the defendants as may be deceased, the unknown spouses of the defendants, the unknown officers, successors, trustees, creditors and assigns of such defendants as are existing, dissolved or dormant corporations, the unknown executors, administrators, trustees, creditors, successors and assigns of such defendants as are or were partners or in partnership, and the unknown guardians and trustees of such of the defendants as are minors or are in anywise under legal disability; and the said defendants, and each of them, and [fol. 33] all persons claiming by, through or under them, are forever barred and excluded from asserting any title, interest or estate in, lien upon, or claim against the said real estate; except the statutory right of redemption as provided by law.

IN DISTRICT COURT OF EDWARDS COUNTY

ORDER APPROVING SHERIFF'S SALE—February 5, 1958

Now on this 5th day of February, 1958, the same being an adjourned day of the regular October, 1957, term of said court comes the plaintiff, John Hancock Mutual Life Insurance Company, a Corporation, by its attorney, James R. Boyd, and the remaining defendants appearing not, either in person or by attorney, and moves the court to confirm the sale of real estate made by the Sheriff of Edwards County, in the State of Kansas, on the 22nd day of January, 1958, under an Order of Sale issued out of the office of the Clerk of the District Court of said County and State, dated the day of December, 1957, and thereupon, upon examination of the order of sale, the publication notice and the proof of publishing the same, together with the return of the sheriff, the court approves the same and finds the proceedings regular and in con-

formity with law and equity, and that such sale should be confirmed.

It is therefore by the Court ordered, adjudged and decreed that the Clerk make an entry upon the journal that the Court finds that said sale has in all respects been made in conformity with law and equity; that such sale should be confirmed and the Sheriff of Edwards County, Kansas, is hereby directed to make to purchaser, John [fol. 34] Hancock Mutual Life Insurance Company, a Corporation, a certificate of sale for the real estate involved herein, fixing the period of redemption at eighteen months from the date of sale.

It is further by the Court ordered that if redemption be not made from such sale within said time that the Sheriff of Edwards County, Kansas, or his successor in office, do make, execute, acknowledge and deliver to the holder of said certificate of sale his sheriff's deed to the following described real estate, to-wit:

The southeast quarter ($SE\frac{1}{4}$) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter ($NW\frac{1}{4}$) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter ($NW\frac{1}{4}$) of section (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence North 1191.5 feet, thence West 1321 feet to the West line of said section twenty-three (23); thence South to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half ($N\frac{1}{2}$) of section twenty-three (23); lying South and East of the A., T. & S. F. Railroad; also Lots one (1), two (2); and three (3) in section twenty-four (24) South of Range nineteen (19) west of the sixth principal meridian,

and shall put the holder of said deed in possession of said premises, and the Clerk of this Court is hereby ordered to issue a writ of assistance for that purpose, and the defendants and each and every person claiming by, through [fol. 35] or under them be and they are hereby perpetually enjoined from claiming or asserting any right, title,

interest, estate in or lien upon said premises contrary to the provisions of said Sheriff's Deed and the right of possession of the holder thereof, and that during the period of redemption above named said defendants and all persons claiming by, through or under them be and they are hereby restrained and enjoined from committing, or permitting any waste on said premises.

IN DISTRICT COURT OF EDWARDS COUNTY

MOTION FOR CERTIFICATE OF REDEMPTION

The defendant, United States of America, moves the Court for an Order directing the Clerk to issue it a certificate of redemption for the property which was the subject matter of this action, for the following reasons:

- (a) The defendant has made a proper tender to the Clerk in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949, and has filed with said tender its affidavit stating the amounts still due on its claim.
- (b) The provisions of Title 28, United States Code, Section 2410(e), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein.

State of Kansas, Shawnee County, ss.

Thomas M. Potter, being duly sworn upon oath, states that he is State Director for Kansas of the Farmers Home [fol. 36] Administration, Topeka, Kansas, an agency of the United States of America, and that the United States of America, through the said Farmers Home Administration is the owner and holder of the three judgments rendered in its favor against defendants George Hetzel and Grace Marie Hetzel in the above-entitled action, which

judgments were adjudged to be second liens on the real estate which was the subject of said action to-wit:

The southeast quarter ($SE\frac{1}{4}$) of section twenty-two (22), less railroad right of way and highway, and a tract in the northwest quarter ($NW\frac{1}{4}$) of section twenty-three (23), described as follows: Beginning at the southwest corner of the northwest quarter ($NW\frac{1}{4}$) of section twenty-three (23); thence running east 1025 feet to the Santa Fe Trail; thence northeast along the Railroad right of way 440 feet; thence north 1191.5 feet; thence west 1321 feet to the west line of said section twenty-three (23); thence south to place of beginning, excepting 1.03 acres for highway and containing 45 acres more or less; also all of the north half ($N\frac{1}{2}$) of section twenty-three (23); lying south and east of the A., T. & S. F. Railroad; also Lots one (1), two (2), and three (3) in section twenty-four together with all accretioned land thereto, all in township twenty-four (24) south of Range nineteen (19) west of the sixth principal meridian, in Edwards County, Kansas.

That there is due to the United States of America through its agency, the Farmers Home Administration, upon said judgments the following sums, plus costs, as of this date:

[fol. 37] (a) Against defendants George Hetzel and Grace Marie Hetzel:

\$10,639.14 plus additional daily interest from and after June 5, 1958, of \$1.2364.

(b) Against the defendant George Hetzel:

1. \$573.79 plus additional daily interest from and after June 5, 1958, of \$.0376.

2. \$1809.14 plus additional daily interest from and after June 5, 1958, of \$.1897.

IN DISTRICT COURT OF EDWARDS COUNTY

JOURNAL ENTRY OVERRULING MOTION FOR CERTIFICATE OF REDEMPTION—September 3, 1958

Now on this 3rd day of September, 1958, the same being an adjourned day of the regular May, 1958, term of said Court, the above entitled cause comes on to the court for hearing on the motion of the United States of America for an order directing the clerk of said court to issue to it a certificate of redemption for the real estate heretofore sold in the above entitled action on mortgage foreclosure sale. The United States of America is present by E. Edward Johnson, Assistant United States Attorney for the District of Kansas; the defendant, George Hetzel, is present by his attorneys, John A. Etling and W. N. Beezley, of Kinsley, Kansas.

And now the United States of America, by and through its said Attorney, waives oral argument on its part and submits said motion on its written brief filed herein. And now counsel for the defendant, George Hetzel, are heard orally on said motion, and the court having considered the written brief filed herein on behalf of the United States of America, and having heard the argument of [fol. 38] said counsel for the defendant, George Hetzel, finds that this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion.

Now therefore, it is by the court considered, ordered adjudged and decreed that said motion be and hereby is overruled.

IN DISTRICT COURT OF EDWARDS COUNTY

NOTICE OF APPEAL—October 30, 1958

To: John Hancock Mutual Life Insurance Company, a corporation, plaintiff, and James R. Boyd, Larned, Kansas, attorney of record for said plaintiff; George Hetzel and Grace Marie Hetzel, defendants, and John A. Etling, Kinsley, Kansas, attorney of record for said defendants; Bert Lewis and Buck Lewis, defendants, all defendants in the military service, all minor

defendants and all defendants under legal disability, and Rae E. Batt, Kinsley, Kansas, their attorney of record and guardian ad litem; H. F. Thompson, George J. Langfeld, Milton M. Meyer, Donald Meyer, Virgil Ernsting, August Krueger, Marian Koch, Ray W. Revell, Mary Katheryn Barrow, W. L. Rogers, and Edward A. Bortz, defendants and H. F. Thompson, Kinsley, Kansas, attorney of record for said defendants; Hiram T. Burr, Inc., a corporation, defendant, and E. C. Minner and Harry A. Waite, Dodge City, Kansas, attorneys of record for said defendant:

You and each of you are hereby notified that the defendant United States of America does appeal and has appealed to the Supreme Court of Kansas from the judgment and order made and entered in the above entitled cause on September 3, 1958, whereby the motion of the defendant United States of America seeking redemption [fol. 39] of the real property involved in said cause was overruled, the Court finding that it was without jurisdiction to grant the defendant United States of America the relief sought, and that the Court had no jurisdiction of the subject matter of said motion.

Dated October 30, 1958.

AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL
(Omitted in Printing)

• • • • •

[fol. 40]

IN DISTRICT COURT OF
EDWARDS COUNTY

APPLICATION FOR EXTENSION OF TIME FOR FILING ABSTRACT
OF RECORD AND NOTICE OF GRANTING THEREOF

Pursuant to Rule No. 8 of this Court, revised as of May 15, 1955, the Appellant, United States of America, hereby applies to the Court for an extension of time of 30 days from and after December 9, 1958, within which to file the abstract of record herein, and shows to the Court that on October 31, 1958, the Notice of Appeal herein was filed

with the Clerk of the District Court of Edwards County, Kansas, appealing from the order and judgment of said Court entered in this cause on September 3, 1958.

It is further shown to the Court that this is not a case in which a transcript of the testimony is necessary to present the questions submitted to this Court; that the office of the Solicitor General of the Department of Justice, Washington, D. C., presently has the case under [fol. 41] consideration relative to the further pursuit of the appeal filed herein, and that the undersigned counsel for the appellant does not anticipate notification from said Solicitor General of a decision relative to further pursuit of this appeal prior to December 9, 1958.

PROOF OF SERVICE (Omitted in Printing)

[fol. 42] OFFICE CLERK SUPREME COURT

Topeka, Kansas, December 13, 1958

Dear Sir:

The Motion by appellant for additional time to file abstract in the case of John Hancock Mutual Life et al., Appellee v. No. 41,429 United States of America, Appellant, is this day allowed.

IN DISTRICT COURT OF EDWARDS COUNTY

APPLICATION FOR ADDITIONAL EXTENSION OF TIME FOR FILING ABSTRACT OF RECORD AND NOTICE OF GRANTING THEREOF

Pursuant to Rule No. 3 of this Court, revised as of May 15, 1955, the Appellant, United States of America, hereby applies to the Court for an additional extension of time of 30 days from and after January 5, 1959, within which to file the abstract of record herein, and shows to the Court that on October 31, 1958, the Notice of Appeal [fol. 43] herein was filed with the Clerk of the District Court of Edwards County, Kansas, appealing from the order and judgment of said Court entered in this cause on September 3, 1958.

It is further shown to the Court that this is not a case in which a transcript of the testimony is necessary to

present the questions submitted to this Court; that the office of the Solicitor General of the Department of Justice, Washington, D. C., presently has the case under consideration relative to the further pursuit of the appeal filed herein, and that the undersigned counsel for the appellant does not anticipate notification from said Solicitor General of a decision relative to further pursuit of this appeal prior to January 3, 1959.

PROOF OF SERVICE (Omitted in Printing)

[fol. 44] OFFICE CLERK SUPREME COURT

Topeka, Kansas, January 16, 1959

Dear Sir:

The Motion for additional time to file abstract by appellant, in the case of John Hancock Mutual Life Insurance Company, Appellee v. No. 41,429 United States of America, Appellant is this day allowed.

IN DISTRICT COURT OF EDWARDS COUNTY

SPECIFICATION OF ERROR

The District Court erred in denying appellant's motion for an order directing the Clerk to issue to it a certificate of redemption for the property which is the subject matter of this mortgage foreclosure action, which motion was made on the ground that 28 U. S. C. 2410(c) accords appellant a right of redemption co-existent with that accorded appellees George and Grace Marie Hetzel under Section 60-3440, General Statutes of Kansas, 1949, and in holding that it was "without jurisdiction to grant the relief prayed for and (had) no jurisdiction of the subject matter of said motion."

IN THE
SUPREME COURT OF THE STATE OF KANSAS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
a Corporation, APPELLEE

VS.

GEORGE HETZEL; GRACE MARIE HETZEL; H. D. TAYLOR;
AMY F. TAYLOR; BERT LEWIS; BUCK LEWIS; W. E.
ROSTINE, WM. P. ROSTINE, BOYD L. ROSTINE; and all
persons who are or were doing business under the
name of THE HUTCHINSON CONCRETE COMPANY; THE
HOME LUMBER AND SUPPLY COMPANY, INC., a Corpora-
tion; HIRAM T. BURR, INC., a Corporation; A. A.
DOERR MERCANTILE COMPANY, a Corporation; SARAH
J. STOUT; CATHERINE M. BOSTWICK; W. L. ROGERS;
MARIAN KOCH; H. F. THOMPSON; GEORGE J. LANGFIELD;
MILTON M. MEYER; DONALD MEYER; VIRGIL ERNSTING;
AUGUST KRUEGER; ROY W. REVELL; MARY CATHERINE
BARROW; and the unknown heirs, executors, adminis-
trators, devisees, trustees, creditors and assigns of
such of the defendants as may be deceased; the un-
known spouses of the defendants; the unknown officers,
successors, trustees, creditors and assigns of such
defendants as are existing, dissolved, or dormant
corporations; the unknown executors, administrators,
trustees, creditors, successors and assigns of such
defendants as are or were partners or in partnership;
and the unknown guardians and trustees of such of
the defendants as are minors or are in any wise under
legal disability; THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF EDWARDS, APPELLEES

and.

THE UNITED STATES OF AMERICA, APPELLANT

STIPULATION OF COUNSEL RE REAL ESTATE MORTGAGE FOR
KANSAS, SPECIAL LIVESTOCK LOAN WITH ATTACHMENT—
Filed May 15, 1959

It is hereby stipulated and agreed by and between
counsel for the parties to the above appeal that the at-

tached photostatic copies of the document entitled "United States Department of Agriculture—Farmers Home Administration—Real Estate Mortgage For Kansas—Livestock Loan", is a true and accurate copy of the real estate mortgage declared upon by the United States of America acting through the Farmers Home Administration, in its cross petition in the above entitled cause and that the same be and hereby is made a part of the record in [fol. 47] the above entitled Appeal, for consideration of the Court in this cause.

Dated at Topeka, Kansas, this 14th day of May, 1959.

/s/ E. Edward Johnson
Attorney for Appellant.

/s/ Barton E. Griffith

/s/ John A. Etling
Attorneys for Appellees.

UNITED STATES DEPARTMENT OF AGRICULTURE
FARMERS HOME ADMINISTRATION

REAL ESTATE MORTGAGE FOR KANSAS

SPECIAL LIVESTOCK LOAN

KNOW ALL MEN BY THESE PRESENTS:

THAT, WHEREAS, the undersigned GEORGE HETTEL

CRACA M'PIE HETTEL

his wife, of the County of Edwards State of Kansas, hereinafter called Mortgagor, have become justly indebted to the United States of America, acting through the Administrator of the Farmers Home Administration, hereinafter called Mortgagee, whose post office address for the purpose of this instrument is Farmers Home Administration, Department of Agriculture, St. John

Kansas

for the sum of

Ten Thousand Five Hundred Sixty-five and 80/100-

dollars (\$10,565.00), the balance of unpaid principal remaining upon loan made to the Mortgagor, with interest now due to become due at the rate per annum indicated below, which debt is evidenced by a promissory note dated as indicated below, executed by the Mortgagor to the Mortgagee, or other payee indicated therein and now held by the Mortgagee, and payable in one or more installments, said note being described as follows:

DATE	PRINCIPAL AMOUNT	INTEREST RATE	LAST INSTALLMENT DUE
September 1, 1953	\$ 10,565.00	5 %	September 1, 1956
19	\$	%	19
19	\$	%	19
19	\$	%	19
19	\$	%	19
19	\$	%	19
19	\$	%	19
19	\$	%	19

which note is payable at the office of the Farmers Home Administration, Department of Agriculture, St. John

Kansas

and any future or

additional sum or sums not exceeding the aggregate amount of

dollars (\$), loaned to the Mortgagor by the Mortgagee for any purpose, with interest at a rate not in excess of five percent (5%) per annum; and

WHEREAS, Mortgagor is desirous of securing the prompt payment of said note, and the several installments of principal and interest at maturity, and any extension or renewal thereof, and any agreement supplementary thereto, and any additional indebtedness accruing to Mortgagee on account of any future advances or expenditures made as hereinafter provided, and the performance of each and every covenant and agreement of Mortgagor herein contained;

NOW THEREFORE, in consideration of the said indebtedness and to secure the prompt payment thereof, as the same matures or becomes due, and of any extension or renewal thereof, or of any agreement supplementary thereto, and to secure the performance of each and every covenant and agreement of Mortgagor herein contained, Mortgagor does hereby and with these presents mortgage and warrant unto Mortgagee the following described real

estate situated in the County of Edwards State of Kansas, to wit:

The Southeast Quarter (SE $\frac{1}{4}$) of SECTION TWENTY-TWO (22), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian; and

Forty-five acres (45a.) in the Southwest Corner of the Northwest Quarter (NW $\frac{1}{4}$) of SECTION TWENTY-THREE (23), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian; and

One Hundred Seventy-four acres (174a.) all East of the Santa Fe Railway right of way in the North One-half (NE $\frac{1}{2}$) of SECTION TWENTY-THREE (23), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian; and

One Hundred Thirty-six acres (136a.) in the Northwest Quarter (NW $\frac{1}{4}$) of SECTION TWENTY-FOUR (24), Township Twenty-four (24) South, Range Nineteen (19) West of the Sixth Principal Meridian;

[fol. 49]

(2)

SUBJECT TO Mortgage in the amount of \$25,000.00 in favor of The John Hancock Company.

together with all rents and other revenues or incomes therefrom, and all and singular rights, emements, hereditaments, and appurtenances thereto belonging and all improvements and personal property now or hereafter attached to the real property herein described, all of which property is sometimes hereinafter designated as "said property".

TO HAVE AND TO HOLD said property unto Mortgagee and its assigns forever.

AND MORTGAGOR, for himself, his heirs, executors, administrators, successors, and assigns, does hereby and by these presents covenant and agree

1. To use the proceeds of the loan secured hereby solely for the purposes authorized by the Mortgagee.
2. To pay promptly all installments of principal and interest as they become due according to the terms of the said promissory note, and of any agreements supplementary thereto, and any other indebtedness owing by the Mortgagee to the Mortgagee and secured hereby.
3. To pay, before the same shall become delinquent, all taxes, assessments, levies, liabilities, obligations and encumbrances of every nature whatsoever which affect said property or the Mortgagee's rights and interest therein under this mortgage or the indebtedness hereby secured, and promptly to deliver to Mortgagee, without demand, receipts evidencing such payments.
4. Immediately upon the execution of this mortgage to provide, and thereafter continuously maintain, fire insurance policies and such other insurance policies as Mortgagee may then or from time to time require upon the buildings and improvements now situated or hereafter constructed in or upon said property, each such policy to contain a mortgage clause in which the Mortgagee is named as beneficiary. Said fire and other insurance policies shall be deposited with the Mortgagee, if required by the Mortgagee, and shall be with companies, in amounts and on terms and conditions approved by Mortgagee.
5. At all times to maintain said property in proper repair and good condition; to admit or suffer no waste or subtraction of said property.
6. That the Mortgagee, its agents and attorneys, shall have the right at all times to inspect and examine said property for the purpose of ascertaining whether or not the security given is being loaned, diminished, depleted or impaired, and if such inspection or examination shall disclose, in the judgment of the Mortgagee that the security given or property mortgaged is being loaned or impaired, such condition shall be deemed a breach of the covenants of the mortgage on the part of the Mortgagee.
7. To perform, comply with and abide by each and every stipulation, agreement, condition and covenant in said promissory note, and in any extensions or renewals thereof, and in any agreement supplementary thereto secured by Mortgagee on account of said indebtedness, and in this mortgage contained.
8. To comply with all laws, ordinances and regulations affecting said property or its use.
9. That the Mortgagee shall give the Mortgagee additional security for the indebtedness hereinbefore described at such times as the Mortgagee shall so request.
10. That all of the terms and provisions of the note which this mortgage secures, and of any extension or renewal thereof, and of any agreement supplementary thereto, secured by Mortgagee on account of said indebtedness, are hereby incorporated in and made a part of this mortgage as if the same were set out in full herein, and will be construed with said mortgage as one instrument.

11. That all awards of damages up to the amount of the indebtedness of Mortgagor to Mortgagee for any condemnation for public use of or injury to any of said property are hereby assigned and shall be paid to Mortgagee who may apply same to payment of the installments last to become due under said note, or Mortgagee is hereby authorized, in the name of Mortgagee, to execute and deliver valid acquittances therefor and to cancel in the name of Mortgagee or Mortgagee from any such award.
12. That, without in any manner affecting the right of Mortgagee to require and enforce performance at a subsequent date of the same, similar or any other covenant, agreement or obligation herein set forth, and without affecting the liability of any person for payment of any indebtedness secured hereby, and without affecting the lien created upon said property or the priority of said lien, Mortgagee is hereby authorized and empowered at its option and at any time to (1) waive the performance of any covenant or obligation herein or in said note contained, (2) deal in any way with Mortgagee or grant to Mortgagee any indulgence or forbearance or extension of the time for payment of any indebtedness hereby secured, and (3) execute and deliver partial releases of any part of said property from the lien hereby created.
13. That wherever the context hereof requires, the masculine gender as used herein shall include the feminine and the neuter, and the singular number as used herein shall include the plural, and vice versa.
14. That if advances are made or expenses incurred by the Mortgagee which become an additional amount due to Mortgagee under the terms of this instrument, any payments received by Mortgagee hereunder after such advances or expenses become due shall be applied, first, to the payment of such advances or expenses with interest thereon at the same rate as that specified in the latest note secured hereby until paid, PROVIDED, HOWEVER, that any payment made to Mortgagee during the continuance of any default hereunder may be applied to the extinguishment of any indebtedness hereby secured in such order as Mortgagee may determine, notwithstanding any provision to the contrary herein or in said note contained.
15. That Mortgagee will record this mortgage at his expense in the office of the Register of Deeds in the county in which the real estate covered by this mortgage is situated.
16. That should Mortgagee assign, sell, lease, transfer or encumber said property or any interest therein, voluntarily, involuntarily, or otherwise, or should he abandon said property or become an incompetent or be declared a bankrupt or an insolvent or make an assignment for the benefit of creditors, or fail to keep, perform and comply with any covenant, warranty or condition in this instrument contained or referred to, without the consent of Mortgagee, or upon the death of Mortgagee, Mortgagee may declare the amount unpaid immediately due and payable and thereupon exercise any remedy provided herein or by law.
17. That any notice, consent or other act to be given or done by the Mortgagee under this mortgage shall be valid only if in writing and executed or performed by the Administrator of the Farmers Home Administration or his duly authorized representative.
18. That all notices to be given under this mortgage shall be delivered or forwarded by registered mail, addressed in the case of the Mortgagee to Farmers Home Administration, Department of Agriculture, at
Topeka, Kansas
and in the case of the Mortgagor to him at the post office address of the real estate covered by this mortgage.
19. That Mortgagee does hereby authorize and empower Mortgagee (1) to take possession of said property at any time there is any default in the payment of the debt hereby secured or in the performance of any obligation herein contained, and to rent the same for the account of Mortgagee and (2) upon commencement of any proceedings, judicial or otherwise, to enforce any right under this mortgage, to have a Receiver for said property appointed by a court of competent jurisdiction, upon application by Mortgagee and production of this mortgage, without other evidence and without notice of hearing of said application; which Receiver shall have, and exercise therefrom during said default and the period of redemption, all rents, profits and other revenues collected as herein provided by either the Mortgagee or the Receiver shall be applied, after deduction of all costs of collection and administration, upon the mortgage debt in such manner as the Mortgagee or the court may direct; Provided, however, that if the Mortgagee be in default in the payment of any other debt to Mortgagee not secured by this mortgage, Mortgagee or Receiver may apply the rents, profits and other revenues hereby collected to the reduction of same.
20. That all rights, privileges, benefits, obligations and powers herein conferred on the Mortgagee may be exercised on behalf of the Mortgagee by the Secretary of Agriculture, the Administrator of the Farmers Home Administration, or by the hand of any other agency of the Federal Government that from time to time be vested with authority over the subject matter of this contract or his duly authorized representative.
21. THAT THIS IS OF THE ESSENCE of this mortgage and to the note and other instruments herein referred to, AND SHOULD SAME be made in the payment of the debt hereby secured hereby, or any installment due under said note, or under any extension or renewal thereof, or under any agreement supplementary thereto, or should Mortgagee fail to keep or perform any covenant, condition, or agreement herein contained or referred to, or if the Mortgagee should apply the proceeds of this loan to substantially different purposes from those for which it was obtained, or if any representations herein made by the Mortgagee prove false in any respect, or in the event of the actual bankruptcy or of the insolvency of the Mortgagee, or if any of the property subject to the lien covered by this mortgage is attached, levied upon, or for any reason when possession of by any person other than the Mortgagee, or if the Mortgagee abandons any of said property, or if for any reason the Mortgagee should deem itself insecure, then in any of said events Mortgagee is hereby irrevocably authorized and empowered, at its option and without notice and without affecting the lien hereby created or its priority or any right of Mortgagee hereunder (1) to suspend and suspend said property and to insure any reasonable expense in the maintenance of said property, including the payment of taxes, insurance premiums, and any other necessary costs and expenditures for the preservation and protection of this lien, (2) to declare the entire indebtedness herein secured immediately due and payable and to foreclose this mortgage in the manner hereinafter set out, and (3) to pursue any remedy provided by law, PROVIDED, HOWEVER, that each right, power, or remedy herein conferred upon Mortgagee is cumulative of any other right, power, or remedy of Mortgagee, whether herein set out or conferred by law, and

[fol. 51]

may be enforced concurrently therewith. All moneys advanced or expended by Mortgagee as herein provided, including costs of evidence of title to and survey of said property, reasonable attorney's fees, court costs and other expenses incurred in enforcing a provision herein, with interest at the same rate as that upon said note, shall be secured hereby until repaid. All to come a part of the indebtedness herein secured and shall be payable by Mortgagor to Mortgagee as herein provided, as part of the principal obligation, immediately after each expenditure and without demand, in lawful money of the United States, at the place hereinafter specified, or at such other place as Mortgagee may designate.

20. That Mortgagee may foreclose this mortgage by action in a court of competent jurisdiction in accordance with the laws existing at the time of the commencement thereof, and said property may be sold on terms and conditions satisfactory to Mortgagee.

21. That, should this said property be sold under foreclosure: (1) Mortgagee or its agent may bid at such sale and purchase said property as a stranger; (2) Mortgagee will pay all costs, fees and other expenses incurred in connection therewith; and (3) Mortgagee does hereby say, sooty unto, to the extent provided by law, the benefits of all homestead, exempt, exemption, valuation, appraisement, stay and moratorium laws of the State of Kansas now in force or which may hereafter become laws, and the rights of possession of the mortgaged property during the period of redemption.

22. That application of the proceeds of a sale shall be made in the following order: (1) to the payment of the cost of foreclosure, including any costs advertising, selling and conveying said property, abstract of title, court costs and other expenses incident and necessary thereto; (2) to the payment of any amounts that shall have been expended by the Mortgagee or that may then be necessary to expend in the payment of insurance premiums, taxes or other expenditures as herein provided, with interest thereon as aforesaid; (3) to the payment in full of the note herein secured, whether the same shall or shall not have fully matured at the time of said sale; (4) to the payment of secondary liens duly approved and allowed by the court; and (5) the balance, if any, shall be delivered to the Mortgagor.

23. That neither said property nor any interest therein will be assigned, sold, conveyed, mortgaged, leased, or otherwise, without the consent of the Government.

24.

STATE OF KANSAS
EDWARDS COUNTY

Subscribed and sworn to before me this 22nd day of October, 1921.

Notary Public in and for the State of Kansas

1. I am under the hand of _____ and seal of _____

Kinsley, Kansas

(Mail Address)

Kinsley, Kansas

(Mail Address)

George M. Hotal (Husband)

Grace Marie Hotal (Wife)

ACKNOWLEDGMENT

State of Kansas

County of Edwards

On this 22nd day of October

A. D. 1921 before me the

notary public in and for said County and State, personally appeared GEORGE M. HOTAL and GRACE MARIE HOTAL, husband and wife

known to me to be the same person(s) who executed the within and foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed.

Myself
Notary Public

(S. H.)

My commission expires 3 Sept. 1924

The foregoing instrument is to be recorded and mortgage commences to run from the date of this and its date of recording.

[fol. 52] (File Endorsement Omitted)

[fol. 53] IN SUPREME COURT OF KANSAS

No. 41,429

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
APPELLEE

v.

GEORGE HETZEL, GRACE MARIE HETZEL, ET AL., APPELLEES
and

THE UNITED STATES OF AMERICA, APPELLANT

OPINION—July 10, 1959

SYLLABUS BY THE COURT

1. *MORTGAGES—Foreclosure—Certificate of Purchase to First Mortgagee—Motion for Redemption Certificate Overruled.* In a foreclosure suit the trial court decreed foreclosure of an insurance company's first mortgage and the government's second mortgage executed by the same mortgagors on the same parcel of real property located in Edwards county. At the sheriff's sale the insurance company, the only bidder, received a certificate of purchase in its favor for the amount due under the decree of foreclosure. As is more fully set out in the opinion, the government attempted to redeem the property in the first year after the sheriff's sale but its motion for an order of the trial court directing the clerk of the court to issue it a redemption receipt was overruled. *Held*, the trial court did not err in overruling the government's motion.
2. *SAME—Foreclosure—Redemption by Mortgagors.* Under the facts and circumstances set out in paragraph 1 above and subsequent to the attempt of the government to redeem the property, the mortgagors paid the necessary amount to redeem within twelve months after the sheriff's sale, and it is further *held*, the trial court did not err in ordering the clerk to issue a redemption receipt to the mortgagors.

[fol. 54]. 3. TRIAL—*Findings—Conclusiveness*. It is the general duty of a court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment are not conclusive in other actions.

4. MORTGAGES—*Foreclosure Decree Not Determinative of Redemption Rights*. In a factual situation such as is stated in paragraph 1, the mortgage foreclosure decree did not determine the redemption rights of the mortgagors under state and federal statutes (G. S. 1949, 60-3440, *et seq.*; 28 U. S. C. § 2410) and the trial court had jurisdiction to determine those rights at a subsequent term.

5. CONFLICT OF LAWS—*Effect of State Law on Government*. "A state law affecting the title to property must be followed and is binding upon the United States." (*United States v. Ryan*, 124 F. Supp. 1.)

6. MORTGAGES—*Priority of Federal Statutes*. If the federal government is entitled to a priority, as is more fully shown in the opinion, it must be based on some statutory enactment but the federal statute (28 U. S. C. § 2410) is not mandatory. It merely waives sovereign immunity in suits to foreclose mortgages; it does not attempt to give priority in all cases to liens created under the paramount authority of the federal government. (*United States v. Cless*, 150 F. Supp. 687, 690.)

7. SAME—*Government Lien—Dependency on State Laws*. In a case concerning a lien of the federal government under a second mortgage created in the course of an ordinary business transaction of an agency of the government, as to which there is no federal statutory provision conferring upon it any particular sanctity, the government is entirely dependent upon state laws both as to its position and enforcement. (*United States v. Cless*, *supra*, pp. 687, 692.)

8. SAME—*Rights of Government Stated*. Nothing in the federal statute (28 U. S. C. § 2410) gives the federal government rights superior to those enjoyed by private citizens; a federal agency is to be governed by the

same local law which controls the rights of private citizens in a similar endeavor. (*United States v. Cless*, 254 F. 2d 590, 593, 594.)

9. *SAME—Sheriff's Sale—Government's Right to Bid.* In our present case the government had the authority and power to bid at the sheriff's sale the same as any private citizen in its position whereby its rights would have been protected.

Appeal from Edwards district court; *LORIN T. PETERS*, judge. Opinion filed July 10, 1959. Affirmed.

Morton Hollander, of Washington, D. C., argued the cause, and *George Cochran Doub*, assistant attorney general, *Wilbur G. Leonard*, United States attorney, *E. Edward Johnson*, assistant United States attorney, and *William A. Montgomery*, of Washington, D. C., were with him on the briefs for the appellant.

John A. Etling, of Kinsley, and *Barton E. Griffith*, of Topeka, argued the cause, and *W. N. Beezley*, of Kinsley, was with them on the briefs for the appellees, *George Hetzel* and *Grace Marie Hetzel*.

[fol. 55] The opinion of the court was delivered by

ROBB, J.: The John Hancock Mutual Life Insurance Company, hereafter referred to as the insurance company, on September 3, 1957, filed the original suit herein to recover judgment on its note and foreclose its first mortgage lien on real property in Edwards county belonging to *George Hetzel* and *Grace Marie Hetzel*, hereafter referred to as mortgagors, who had executed a note and mortgage as security therefor. Another defendant and the appellant here, the United States of America, hereafter referred to as the government, is also holder of notes and a second mortgage, as security for one of the notes, executed by the same mortgagors on the same real property. In this appeal we are not concerned with other defendants of record or their claims. No dispute exists as to the priority of the mortgages nor as to the pleadings and we shall therefore refer only to the pertinent parts thereof as we proceed with our discussion of the points at issue.

On December 4, 1957, the trial court entered judgment on the respective notes and foreclosed the first mortgage in favor of the insurance company and the second mortgage in favor of the government. The decree further provided that if the mortgagors failed to pay the judgments within ten days, the sheriff of Edwards county was directed to advertise and sell the real property according to law subject to redemption for a period of eighteen months after the date of sale. The proceeds were to be applied on costs, taxes, on the first lien of the insurance company and then on the government's second lien.

The mortgagors failed to pay within ten days and on January 22, 1958, the sheriff's sale was held. The only bidder was the insurance company which bid the property in for the full amount of its judgment, interest, taxes and costs. The government did not bid at the sheriff's sale. The insurance company was the only party who appeared to move for the court's confirmation order of the sheriff's sale. On February 5, 1958, the trial court confirmed the sale and directed the sheriff to issue to the purchaser a certificate of sale for the real property, fixing the period of redemption at eighteen months from the date of sale. If redemption were not made within time, the sheriff was directed to make, execute and deliver to the holder of said certificate his sheriff's deed to the real property and put the holder thereof in possession.

[fol. 56] On June 5, 1958, the government requested the district court clerk to issue a certificate of redemption to it pursuant to its tender under G. S. 1949, 60-3451. The amount thereof was to be measured by the *lex rei sitae* (normal state-law rule) to effectuate its right to redeem the property under 28 U. S. C. 2410(c), which section is appended hereto. This request was declined by the clerk and in a letter dated July 8, 1958, the district court, in brief, informed the government that the holder of the certificate of purchase and the mortgagors questioned the government's right to redeem the real property at that time and consequently the clerk would not issue the redemption certificate until the court so ordered. The letter further stated the court would be on vacation until Sep-

tember but it presumed the government would want to file a motion raising the question and would serve opposing counsel and have the motion set for hearing.

On July 23, 1958, the government filed its motion seeking an order of the district court directing the clerk to issue a certificate of redemption to it, alleging that:

"(a) The defendant has made a proper tender to the Clerk in keeping with the provisions of Section 60-3451, General Statutes of Kansas, 1949, and has filed with said tender its affidavit stating the amounts still due on its claim.

"(b) The provisions of Title 28, United States Code, Section 2410 (c), under which joinder of this defendant as a party to this action is authorized, accord this defendant a right of redemption co-existent with that accorded the defendant owner by Section 60-3440, General Statutes of Kansas, 1949, during the first twelve months after the sale of the property involved herein."

Another portion of the motion contained the affidavit referred to in (a) above.

On September 3, 1958, during a hearing on the government's motion, the mortgagors contended the trial court was without jurisdiction to grant the relief sought in the government's motion. The trial court so found and in its order overruling the motion on the same day stated:

"... this court is without jurisdiction to grant the relief prayed for and has no jurisdiction of the subject matter of said motion."

The government timely perfected the instant appeal from the above order and raises two questions.

1. Did the trial court err in denying the government's motion made on the ground that 28 U. S. C. 2410 (c) accords the government a co-existence redemption right with that of the mortgagors under G. S. 1949, 60-3440?

2. Did the trial court have jurisdiction over the subject matter of the motion and to grant the relief prayed for?

[fol. 57] On January 14, 1959, the mortgagors redeemed the property and were issued a certificate of redemption by the clerk of the court.

As is customary, we will proceed to the determination of the jurisdictional question, if one there be, before reaching the first question raised by the government.

The foreclosure decree entered on December 4, 1957, and the order of confirmation of sheriff's sale on February 5, 1958, occurred during the term of court beginning on the fourth Monday of October, 1957, the next term began on the second Monday of February, 1958, and the government's request of the court clerk for a redemption certificate made on June 5, 1958, was in the term of that court which began on the first Monday of May, 1958. The motion, as above stated, was filed on July 23, 1958, which means that two terms of court in the thirty-third judicial district including Edwards county (G. S. 1949, 20-1029a) had expired from the time of the trial court's decree and order on December 4, 1957, and the government's demand on the court clerk and motion addressed to the trial court on July 23, 1958.

The mortgagors contend that a trial court loses jurisdiction over its judgment after the expiration of the term in which a judgment is rendered absent the exceptions provided for in G. S. 1949, 60-3007, which are not present here. The contention is too far-reaching. The controlling rule of law as to jurisdiction after term was stated in *Keys v. Smallwood*, 152 Kan. 115, 102 P. 2d 1001.

"Rule followed that a judgment cannot be set aside, modified or in anywise affected after the term at which it is rendered except as provided by the civil code." (Syl. ¶ 1.)

However, the *Keys* case was a garnishment proceeding and is not applicable in our present case.

Other authorities cited by the mortgagors are somewhat similar to the overall picture presented by our present case but they are distinguishable as to the question under consideration and, therefore, are not determinative thereof.

The government calls our attention to *Johnson v. Wear*, 110 Kan. 237, 204 Pac. 141, wherein (p. 243) *Mitchell v.*

Insley, 33 Kan. 654, 657, 7 Pac. 201, was cited. The Mitchell case involved an original ejectment action where a deed was determined to constitute a mortgage to secure a payment of \$2,000 and the mortgagee had a lien upon the land but it was further determined his remedy was not by ejectment. Subsequently the mortgagee filed a [fol. 58] mortgage foreclosure suit wherein the amount due under the mortgage was in issue. (p. 658.) The court stated that the amount due on the mortgage in the ejectment action was wholly immaterial, that the adjudication the deed was a mortgage was conclusive, and perhaps that *something was due*, but not the amount. The question of the amount due, therefore, remained undetermined. Justice Marshall in the Johnson case (p. 243) quoted the following language from page 657 of the Mitchell case:

"It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment."

The Mitchell case was also cited in *Landon v. Clark*, 221 Fed. 841, 845.

The only provision of the decree of foreclosure pertaining to redemption reads:

"... and in case said real estate is not redeemed from said sale for a period of eighteen months from the date of sale, as is by law in such cases made and provided. ..."

By reason of the foregoing, the trial court obviously did not fully determine the redemption rights of the mortgagors as against the government, or *vice versa*, except by the general language of the phrase, "... as is by law in such cases made and provided." The redemption rights of the mortgagors under our state statutes (G. S. 1949; 60-3440, *et seq.*) were therefore covered as were also the government's redemption rights under 28 U. S. C. § 2410. Expressed in another way, the trial court, by

using the language quoted above, of necessity ruled that all questions regarding the redemption of the real property here involved would be governed by both state and federal law.

We believe the trial court intended to subject the redemption questions to both state and federal law and that it made clear such intention when ruling on the government's motion by use of the following language:

"Now therefore, it is by the court considered, ordered adjudged and decreed that said motion be and hereby is overruled."

What other possible construction can be given this order? The motion was neither dismissed nor stricken, but was ruled upon, and in view of what has herein been said and the authorities relied on by the government in support of its contention that the trial court did have [fol. 59] jurisdiction of the subject matter, we can only conclude the trial court had, and exercised, authority to determine the rights of redemption "as is by law in such cases made and provided," as well as the power to grant or deny the relief prayed for in the motion by the government.

Determination of the second question requires that we set out a part of the mortgage executed by the mortgagors to the government. The form contained the following heading:

"United States Department of Agriculture

"Farmers Home Administration.

"REAL ESTATE MORTGAGE FOR KANSAS

"Special Livestock Loan"

Section 21 of the mortgage contained these provisions:

"THAT TIME IS OF THE ESSENCE of this mortgage and of the note . . . AND SHOULD DEFAULT be made in the payment of the note secured hereby, or any installment due under said note . . . or for any reason the Mortgagee should deem itself insecure, then in any of said events Mortgagee is hereby irrevocably authorized, and empowered . . . (1) to inspect and repair said property . . . (2) to declare the entire

indebtedness herein secured immediately due and payable and to foreclose this mortgage in the manner hereinafter set out, and (3) to pursue any remedy for it by law provided; PROVIDED, HOWEVER, that each right, power, or remedy herein conferred upon Mortgagee is cumulative to every other right, power, or remedy of Mortgagee, whether herein set out or conferred by law. . . ."

Section 22 in part provided:

"That Mortgagee may foreclose this mortgage by action in a court of competent jurisdiction in accordance with the laws existing at the time of the commencement thereof. . . ."

Section 23 in pertinent part reads:

"That, should this said property be sold under foreclosure (1) Mortgagee or its agent may bid at such sale and purchase said property as a stranger: (2) Mortgagor will pay all costs. . . . (3) Mortgagor does hereby expressly waive, *to the extent permitted by law* the benefits of all homestead, dower, exemption valuation, appraisement, stay and moratorium laws of the State of Kansas now in force or which may hereafter become laws, and the rights of possession of the mortgaged property during the period of redemption." (Our emphasis.)

The mortgagors base their contentions primarily on G. S. 1949, 60-3440 as follows:

"For the first twelve months after such sale, the right of the defendant owner to redeem is exclusive; but if no redemption is made by the defendant owner at the end of that time, any creditor of the defendant and owner whose demand is a lien upon such real estate may redeem the same at any time within [fol. 60] fifteen months from the date of sale. A mechanic's lien, before decree enforcing the same, shall not be deemed such a lien as to entitle the holder to redeem."

□ The government places its reliance on 28 U. S. C. § 2410, which is hereto appended in full, but more particularly it relies on subsection (c) thereof, as follows:

"Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem."

Mortgagors referred to other statute involving redemption. Some of them are of little, if any, help in the determination of this appeal. Briefly stated, those that are pertinent here provide that after the issuance of the certificate to the purchaser at the sheriff's sale (G. S. 1949, 60-3438), the mortgagors could redeem the real property at any time within eighteen months from the day of sale (60-3439); for the first twelve months after the day of sale the mortgagors had the exclusive right to redeem but if at the end of that time they had not done so, any lien creditor could redeem within fifteen months from the date of sale (60-3440); after the expiration of the fifteen months, the mortgagors could still redeem at any time before the end of the eighteen months, but the creditors could not. (60-3447.) The mortgagors could assign or transfer their rights of redemption whereby those same rights would pass to an assignee or transferee. (60-3455.) See *Union Central Life Ins. Co. v. Reser*, 134 Kan. 876, 8 P.2d 366, for further discussion of some of our redemption statutes.

The sovereign immunity of the government from suit without the express mandate of the Congress to the contrary, by waiver or granting permission for such suit or suits, is of sufficient general knowledge that a full legal discussion thereof would be surplusage.

Neither can there be any argument with the government's contention that federal laws are supreme over state laws where a conflict exists between them such as occurred in an action in a state court to recover statutory penalties for violation of the emergency price control act. (*Testa v. Katt*, 330 U. S. 386, 67 S. Ct. 810, 91 L. ed. 967.) The same is true where there were labor disputes involving interstate or foreign commerce, (*Myers v. Bethlehem Corp.*, 303 U. S. 41, 58 S. Ct. 459, 82 L. ed. 638.)

The Supreme Court of the United States has not been hesitant in cases involving diversity of citizenship to [fol. 61] remand them for determination by the federal circuit court under state laws. For example, *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1189, was an action concerning tort liability and involved application of state laws by the federal circuit court.

In *United States v. Ryan*, 124 F. Supp. 1, the Minnesota Torrens system as it related to the filing of federal tax liens was comprehensively explained and it was held that the government failed to comply with the procedural requirements of the state law whereby its lien for taxes was lost. We cannot repeat all that was said in the Ryan case, as to do so would unduly extend this opinion, but the following statements therefrom are of significant consequence herein:

"The United States is not exempt from the provisions of the state statutes. The laws of the United States definitely provide that the tax lien here asserted will not become a valid lien unless notice thereof is filed as by state law prescribed. A state law affecting the title to property must be followed, and is binding upon the United States." (p. 10.)

"At any time, however, up to the time of the foreclosure of the prior mortgage held by Minnesota Federal Savings and Loan Association, the plaintiff could have perfected its lien by filing the notice as by statute required. The foreclosure of the mortgage and the expiration of the period of redemption has now precluded plaintiff from so doing. The mortgage contained a power of sale. Under the laws of the State of Minnesota, a mortgage containing a power of sale may be foreclosed by advertisement. There is nothing in the United States Code which precludes a foreclosure by advertisement, 28 U. S. C. A. § 2410 provides that in any action to foreclose a mortgage the United States may be joined as a party defendant. But there is nothing in this section, or in any section of the United States Code, which prohibits a foreclosure under a power of sale or which provides that the United States will not be bound thereby. The

Minnesota Federal Savings and Loan Association was entitled to foreclose by advertisement, and the plaintiff, and all other parties interested in the property, is bound by the foreclosure. This exact question was before the Court in the case of *Trust Co. of Texas v. United States*, D. C., 3 F. Supp. 683, and the Court held that a mortgage foreclosure under power of sale extinguishes not only the rights of the owner in the property sold, but all subsequent and inferior liens thereon, *including the lien of the United States*. Therefore, in the instant case, the foreclosure divested the interest of the registered owner, Kenneth Ryan, and the rights of all parties claiming under or through him, including the plaintiff here." (pp. 10-11.)

A case more analogous to our present one is *United States v. Cless*, 150 F. Supp. 687, where a first mortgagee had obtained a writ of *fiat facias* and later bid in and purchased the mortgaged property at the sheriff's sale. He then sold the property to another but title had not yet passed. [fol. 62] The government was seeking foreclosure of its second mortgage and the question was whether the second mortgage lien was divested by the sheriff's sale in the light of 28 U. S. C. § 2410. In rendering summary judgment against the government, the district court there said:

"At the time the agency [the government] made this loan and entered its mortgage it had notice that its mortgage was second in lien to a first mortgage held by an individual entered over a year prior thereto.

"The mortgagors defaulted on their first mortgage. The mortgagee foreclosed and bought in the property at the Sheriff's sale on his bid of the costs of the sale. Had the second mortgagee been an individual there is no question but that the lien of the second mortgagee would have been extinguished by the foreclosure on the first mortgagee. Is the situation changed because the United States happens to be the second mortgage holder?

"The Government leans heavily on 28 U. S. C. § 2410 (a), above cited. This statute is not mandatory, — it merely waives sovereign immunity in suits to fore-

close mortgages or quiet titles. *Haldeman v. United States*, D. C. E. D. Mich., 93 F. Supp. 889. In other words, the purpose of this statute in which the United States consents to be named a party in an action which seeks an adjudication touching any mortgage or other lien of the United States is merely to waive sovereign immunity from suit in certain types of cases. *Wells v. Long*, 9 Cir., 162 F. 2d 842.

"If the United States is entitled to a priority in this case it must be based on some statutory enactment. . . . the federal statutes do not attempt to give priority in all cases to liens created under the paramount authority of the United States." (pp. 689-690.)

The court therein further stated:

"I find no evidence of a Congressional sensitivity in relation to claims of the Government predicated on loans made to individuals by various governmental agencies comparable to that evidenced in relation to tax claims; and for the very obvious reason that the latter deals, as above indicated, with a matter of public policy,—the collection of taxes to enable the Government to function. Certainly what was said in the Ryan case, *supra*, is pertinent in connection with the problem presented in this case concerning the lien of the United States under a second mortgage created in the course of an ordinary business transaction of an agency of the United States, as to which there is no federal statutory provision conferring any particular sanctity, and which, therefore, is dependent entirely both as to its position and enforcement upon State laws." (p. 692.)

The Cless case was appealed by the government and appears as *United States v. Cless*, 254 F. 2d 590, where the circuit court affirmed the lower court and stated:

"We find nothing the the statute giving the United States rights in this matter superior to the rights enjoyed by private citizens. The statute accords to the government no such preference." (p. 593.)

In the same opinion it is further stated:

"In the absence of express Congressional action to the contrary, we think it is not asking too much from a federal agency, which has embarked upon the [fol. 63] business of lending money in competition with private firms and individuals, simply to be governed by the same local law which controls the rights of private citizens in a similar endeavor." (p. 594.)

In view of the language in the above federal court decisions to the effect that there is nothing in 28 U. S. C., § 2410 giving the government rights that are superior or preferential to the rights enjoyed by private citizens, we are unable to see that the government in this appeal has made it affirmatively appear that its substantial rights have been prejudiced. In its answer in the original foreclosure proceedings, the government, under 28 U. S. C., § 2410, could have asked for preferential or superior rights of redemption over those of the mortgagors, or at the time the trial court entered its judgment of foreclosure the government could have sought to have its redemption rights determined, and finally, had the trial court, in view of the decisions of the federal courts, refused to grant such preferential or superior rights, the government still had the authority and power to bid at the sheriff's sale, which would have fully protected it. The government admits that it had the authority and power to bid at the sheriff's sale the same as any private citizen in its position. The federal farm mortgage corporation was holder of a second mortgage under circumstances identical with those in our present case in *Federal Land Bank v. Ludwig*, 157 Kan. 657, 143 P. 2d 784. The mortgage corporation appealed from an adverse decision of the court below. This court set out the pertinent statutes (pp. 659-660) and in reversing the trial court, substantially stated what has just been said above in respect to the government's right to redeem. (pp. 660-661.)

In *United States v. Jungels*, 167 Kan. 482, 207 P. 2d 402, the government filed a claim on notes which had been barred by the five year statute of limitation for a long time—but less than twenty years. The evidence showed that during his lifetime the deceased maker had been sol-

vent so far as non-exempt personal, real, and mixed property was concerned. The trial court's instructions were that the jury could consider all this in determining "that it is more likely that these notes have been paid than that they have not," (p. 484) and in affirming the verdict and judgment against the government, this court set out the controlling rules of evidence and concluded:

"While the statutes of limitation and nonclaim do not run against the United States when suing in its sovereign capacity it is well established that when the United States brings an action for money it is governed by the rules of evidence just as any litigant." (pp. 487-488.)

[fol. 64] Considering the terms of the government's mortgage which bound both it and the mortgagors, all the provisions of 28 U. S. C., § 2410, the appropriate Kansas statutes and the cases decided thereunder, and the points emphasized in the foregoing discussion, we are compelled to hold the trial court was correct in its final decree overruling the motion of the government for a certificate of redemption irrespective of the reasons given or those that may be inferred from the journal entry of judgment.

Affirmed.

APPENDIX

"28 U. S. C. 2410 provides as follows:

"(a) Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska, or in any State court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien.

"(b) The complaint shall set forth with particularity the nature of the interest or lien of the United States. In actions in the State courts service upon the United States shall be made by serving the process of the court

with a copy of the complaint upon the United States attorney for the district in which the action is brought or upon an assistant United States attorney or clerical employee designated by the United States attorney in writing filed with the clerk of the court in which the action is brought and by sending copies of the process and complaint, by registered mail, to the Attorney General of the United States at Washington, District of Columbia. In such actions the United States may appear and answer, plead or demur within sixty days after such service or such further time as the court may allow.

“(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the [fol. 65] property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.

“(d) Whenever any person has a lien upon any real or personal property, duly recorded in the jurisdiction in which the property is located, and a junior lien, other than a tax lien, in favor of the United States attaches to such property, such person may make a written request to the officer charged with the administration of the laws in respect of which the lien of the United States arises.

to have the same extinguished. If after appropriate investigation, it appears to such officer that the proceeds from the sale of the property would be insufficient to wholly or partly satisfy the lien of the United States, or that the claim of the United States has been satisfied or by lapse of time or otherwise has become unenforceable, such officer shall so report to the Comptroller General who may issue a certificate releasing the property from such lien."

[fol. 66-67] [SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.

October 2, 1959

Address Reply to the
Division Indicated

and Refer to Initials and Number

GCD:SDS:MRJ

101-29-107

AIR MAIL

Mr. Walt Neibarger
Clerk, Supreme Court of Kansas,
Topeka, Kansas

Re: John Hancock Mutual Life Insurance
Co., Appellee v. George Hetzel, et al.,
Appellees, and United States of America,
Appellant (No. 41429).

Dear Mr. Neibarger:

Enclosed herein for filing in your Court is a notice of appeal by the United States in the above-captioned case to the Supreme Court of the United States, in accordance with Rule 10 of the Rules of the Supreme Court of the United States. We enclose also a certificate of service.

As requested in the notice, your preparation and transmission of the record to the Supreme Court will be greatly appreciated.

Yours very truly,

GEORGE COCHRAN DOUB
Assistant Attorney General
Civil Division

By: /s/ Samuel D. Slade
Samuel D. Slade
Chief, Appellate Section

Enclosures

cc: Barton E. Griffith, Esquire
National Bank of Topeka Building
Topeka, Kansas

James E. Boyd, Esquire
Larned, Kansas

Rae E. Batt, Esquire
Kinsley, Kansas

H. F. Thompson, Esquire
Kinsley, Kansas

E. C. Minner, Esquire
Dodge City, Kansas

John Etling, Esquire
Kinsley, Kansas

[fol. 68]

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 41,429

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
a Corporation, APPELLEE

vs.

GEORGE HETZEL; GRACE MARIE HETZEL; H. D. TAYLOR;
AMY F. TAYLOR; BERT LEWIS; BUCK LEWIS; W. E.
ROSTINE, WM. R. ROSTINE, BOYD L. ROSTINE; and all
persons who are or were doing business under the
name of THE HUTCHINSON CONCRETE COMPANY; THE
HOME LUMBER AND SUPPLY COMPANY, Inc., a Corpora-
tion; HIRAM T. BURR, Inc., a Corporation; A. A.
BOERR MERCANTILE COMPANY, a Corporation; SARAH
J. STOUT; CATHERINE M. BOSTWICK; W. L. ROGERS;
MARLAN KOCH; H. F. THOMPSON; GEORGE J. LANGFELD;
MILTON M. MEYER; DONALD MEYER; VIRGIL ERNSTING;
AUGUST KRUEGER; ROY W. REVELL; MARY CATHERINE
BARROW; and the unknown heirs, executors, adminis-
trators, devisees, trustees, creditors and assigns of
such of the defendants as may be deceased; the un-
known spouses of the defendants; the unknown officers,
successors, trustees, creditors and assigns of such
defendants as are existing, dissolved, or dormant
corporations; the unknown executors, administrators,
trustees, creditors, successors and assigns of such
defendants as are or were partners or in partnership;
and the unknown guardians and trustees of such of
the defendants as are minors or are in anywise under
legal disability; THE BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF EDWARDS, APPELLEES

and

THE UNITED STATES OF AMERICA, APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

I

Notice is hereby given that the United States of Ameri-
ca, the appellant above named, hereby appeals to the

Supreme Court of the United States from the final judgment entered on July 10, 1959, by the Supreme Court of the State of Kansas affirming the order overruling ap-[fol. 69] appellant's motion for an order directing the clerk to issue to it a certificate of redemption.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

II

The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the complete record in the case.

III

The following question is presented by this appeal:

Whether the United States, as the second mortgagee of real estate judicially foreclosed and sold to satisfy the first mortgagee's lien in a proceeding to which the United States was made a party under the waiver of sovereign immunity contained in 28 U.S.C. 2410, can redeem within one year from the date of sale, as provided by 28 U.S.C. 2410(c), despite a conflicting state statute giving the mortgagor the exclusive right to redeem within that period.¹

/s/ George Cochran Doub,
Assistant Attorney General.

/s/ Morton Hollander,

/s/ William A. Montgomery,
Attorneys,
Department of Justice,
Washington 25, D. C.

¹ The question in this case is closely related to *United States v. Illegible*, 264 F. 2d 767 (C.A. 3), in which the Government's petition for a writ of certiorari, filed June 23, 1959, is pending in the Supreme Court of the United States, No. 137, this Term.

[fol. 70] • • • •

[fol. 70-A]

No. 41429

IN THE
SUPREME COURT OF THE STATE OF KANSAS

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY,
APPELLEE

v.

GEORGE HETZEL, GRACE MARIE HETZEL, ET AL., APPELLEES
AND

THE UNITED STATES OF AMERICA, APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the accompanying Notice of Appeal by the United States to the Supreme Court of the United States on Barton E. Griffith, Esquire, National Bank of Topeka Building, Topeka, Kansas, James E. Boyd, Esquire, Larned, Kansas, Rae E. Batt, Esquire, Kinsley, Kansas, H. F. Thompson, Esquire, Kinsley, Kansas, E. C. Minner, Esquire, Dodge City, Kansas, and John A. Etling, Esquire, Kinsley, Kansas, by causing the same to be sent to them by air mail, postage prepaid, on October 2, 1959.

/s/ Morton Hollander
MORTON HOLLANDER
Attorney,
Department of Justice,
Washington 25, D. C.

[fol. 71] [SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
Washington, D. C.

October 12, 1959

Address Reply to the
Division Indicatedand Refer to Initials and Number
GCD:SDS:WAM
101-29-107

AIR MAIL

Mr. Walt Neibarger
Clerk, Supreme Court of Kansas
Topeka, KansasRe: John Hancock Mutual Life Insurance
Co., Appellee v. George Hetzel, et al.,
Appellees, and United States of America,
Appellant (No. 41429)

Dear Mr. Neibarger:

This will acknowledge receipt of your letter of October 6, 1959, with respect to the above-captioned case. You inquired as to the meaning of the request in the notice of appeal that you prepare a transcript of the complete record in the case.

It is our impression that the record in your Court consists solely of (1) the printed abstract of record, (2) a copy of the mortgage instrument, which was not reproduced in the abstract but was filed pursuant to a stipulation between the parties, (3) the briefs filed by the parties, (4) the Court's opinion, and (5) the Government's notice of appeal. Our reference in the notice of appeal to "the complete record in the case" was intended to cover all these items except the briefs.

If there are other documents in the record, these too should be prepared in the manner required by Rule 10 of the United States Supreme Court for inclusion in the transcript of record. It is our understanding that the

original papers filed in the District Court of Edwards County were not transmitted to your Court. We wish to clarify that our request to have you transmit the complete record is based on the assumption that those papers are not part of the record insofar as your Court is concerned. [fol. 72] We trust that this explanation will make sufficiently clear the meaning of the request contained in the notice of appeal, and that it will not be necessary to file a praecipe.

Your letter does not specifically state the date on which the notice of appeal was received and filed. We assume that it was filed on October 6, the date of your letter, but if this assumption is incorrect, we would appreciate your informing us as to the exact date of filing.

Yours very truly,

GEORGE COCHRAN DOUB,
Assistant Attorney General
Civil Division

By: /s/ Samuel D. Slade
Samuel D. Slade
Chief, Appellate Section

cc: Barton E. Griffith, Esquire
National Bank of Topeka Building
Topeka, Kansas

James E. Boyd, Esquire
Larned, Kansas

Rae E. Batt, Esquire
Kinsley, Kansas

H. F. Thompson, Esquire
Kinsley, Kansas

E. C. Minner, Esquire
Dodge City, Kansas

John Etling, Esquire
Kinsley, Kansas

[fol. 73] Clerk's Certificate to foregoing transcript
omitted in printing

[fol. 74] SUPREME COURT OF THE
UNITED STATES

No. 565, October Term, 1959

UNITED STATES, APPELLANT

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., ET AL.

APPEAL from the Supreme Court of the State of Kansas.

ORDER NOTING PROBABLE JURISDICTION—February 23, 1960

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

February 23, 1960